No. 95-506

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

VERMONT INFORMATION PROCESSING INCORPORATED,

Petitioner,

against

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, NY 12224
(518) 473-0903

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

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THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
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Counterstatement of Question Presented

Whether this Court should grant certiorari to review a decision of the New York Court of Appeals holding that the physical presence in New York of petitioner, a Vermont corporation, provided sufficient "nexus" with New York under the Commerce Clause of the United States Constitution to justify imposing upon petitioner the obligation to collect New York compensating use tax on its sales of more than $1 million in computer hardware to customers in New York, when petitioner used its willingness to come to New York to provide services for its software customers as a selling point, and actually came to New York to provide such services on more than forty separate occasions, in connection with more than one-quarter of its overall sales in New York, during the three-year audit period at issue.

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Statement of the Case

Petitioner Vermont Information Processing, Inc. ("VIP") is a company based in Colchester, Vermont and engaged in the business of designing and selling computer software and hardware to beverage distributors, including distributors located

in New York State (150, 178, 202).[1] As of 1987, VIP was not registered with New York State as a vendor for sales and use tax purposes (190). In 1987, while performing a sales tax audit of John J. Boland Distributing ("Boland"), a beverage distributor in Troy, New York, an auditor for the New York State Department of Taxation and Finance discovered a letter dated February 13, 1985 from VIP to Boland (152). This letter indicated, *inter alia*, that Boland was in the process of purchasing both hardware and software from VIP (264). The letter further advised Boland to "budget one to two days at $60.00 per hour for training and installation on the computer and software, as well as actual per diem expenses," and added that "[i]f [Boland] and VIP determine that an installer is needed on-site for additional data prep within 60 days of installation, VIP will provide that person at no charge" (264). A telephone call to Boland revealed that a VIP employee had come to Troy to install the purchased equipment and train employees on Boland's own premises (169, 247).

New York imposes sales or compensating use tax on purchases or sales of "tangible personal property," NY Tax Law §§ 1105(a), 1110. Although, during the period in question, software was not considered tangible personal property, computer hardware was considered tangible personal property and thus subject to tax (49a-50a). On the basis of the letter to Boland, the Audit Division of the Department of Taxation and Finance believed that VIP would be liable for tax on its sales of tangible personal property in New York State (152-154). Accordingly, auditors contacted Howard Aiken ("Aiken"), president of VIP (246-47). Aiken repeatedly refused either to

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[1]Parenthetical citations are to the Record on Appeal in the New York Court of Appeals. Parenthetical citations followed by "a" are to the appendix to the petition for certiorari.

register with New York as a vendor or permit the Audit Division to examine VIP's records (246-47). New York was thus forced to obtain Vermont and federal tax information for VIP from the appropriate taxing authorities and estimate VIP's New York tax on the basis of this information (247).

On November 27, 1987, the Tax Department issued to VIP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing use tax in the amount of $513,112.11 plus interest and penalty for the period from December 1, 1983 through November 30, 1986 (232). VIP protested this assessment (247). At a conciliation conference with Tax Department personnel, VIP agreed to permit an audit by Tax Department auditors (247). This audit was conducted on May 17, 1987, and resulted in a determination that VIP had made taxable sales of $1,216,744 to purchasers in New York during the audit period, producing a use tax liability of $85,172.08 plus statutory interest and penalty (238, 247). This liability was subsequently reduced to $73,275.04 plus interest and penalty (119).

On October 29, 1988, petitioner filed an administrative petition in the Division of Tax Appeals, contending, *inter alia*, that VIP was not liable under the Commerce Clause of the United States Constitution to collect and remit New York use tax (234-35). The Audit Division duly answered (241-42). On June 10, 1991, a hearing was held before Administrative Law Judge Jean Corigliano ("the ALJ"). At the hearing, the Audit Division introduced into evidence both the VIP letter to Boland and several VIP invoices to different beverage distributors in New York. An invoice to G.T. Britt's, Inc. of Athens, New York ("Britt's") revealed charges for "Service" that included "on-site hours," "travel hours," "lodging exp[ense]," "meals expense" and "travel expense" (265). An invoice to Plattsburgh Distributing ("Plattsburgh") included charges for "travel expense,"

mileage, taxi fare, ferry toll, "installation -- travel time," and "installation" time (268-270). A telephone conversation between Diane Carson ("Carson"), who conducted the audit, and Terry Lozier, bookkeeper for Plattsburgh, revealed that a VIP employee had come from Vermont to Plattsburgh to train Lozier in the use of the computer system (161, 270).

In addition to the invoices appearing in the record, Carson testified that many other invoices the auditors examined revealed VIP's presence in New York (164). Carson noted that the auditors had to conduct their on-site audit of VIP by examining individual sales invoices and were not given access to a photocopier at that time (163-64). The invoices that appear in the record were thus obtained "from other external sources" (172). In preparing the audit, however, the auditors compiled a list of other invoices that, in their view, revealed VIP's presence in New York (173-74). This list included some 81 additional invoices, of which 41 include charges for either "travel" or "site" time, signifying time spent by VIP employees at the customer's place of business (262-63).

At the hearing, Aiken described VIP's business in some detail. For customers who already own suitable computer hardware, VIP custom-designs software and trains the customer's employees in its use (181-82). According to Aiken, most of this training occurs at VIP's offices in Vermont (181-82), with perhaps only one percent of it occurring in New York State (203). VIP then usually ships the software to the customer, who installs it himself, although "some" software installation is done by VIP at a customer's place of business (206). For customers with no computer or inadequate hardware, VIP will purchase a suitable computer from IBM, MSI or one other company, install the custom-designed software, and resell the computer to the customer at a mark-up (182, 195-97, 202, 213).

Occasionally, Aiken indicated, a customer has problems with VIP's software. When this occurs, VIP attempts to remedy the problem either by a telephone consultation with the customer or by direct connection, via modem, with the customer's computer (182-83). For perhaps 5% of VIP's customers, however, an on-site visit by VIP employees is necessary to solve the problem (186). Aiken agreed that the invoices to Britt's and Plattsburgh reflect on-site visits by VIP personnel to their New York customers (192-93, 198-200, 209).

Aiken described VIP as obtaining business through word of mouth, as a result of distributors contacting VIP, after which VIP would mail its literature to the potential customer (180). Alison Templeton ("Templeton"), VIP's comptroller, described a somewhat different process. According to Templeton, VIP's contacts with its customers

> would basically be either word of mouth or national conventions. We would introduce ourselves. If someone was interested or if we heard that someone was interested, we would telephone them. To spark their interest further, they would get a brochure and in that brochure often we would have a contract. If they were more interested, we would encourage them to visit one of our other customers so they could see exactly how it operated. And if they became even more interested, we would often invite them to Vermont * * * (218).

On February 27, 1992, the ALJ issued a determination sustaining the assessment against petitioner. The ALJ concluded, *inter alia*, that VIP's presence in New York during the audit period, including its sales of more than $1 million in taxable property and the "not insignificant" number of visits to New York in connection with sales it had made, provided a

"sufficient nexus between New York and VIP" to justify imposition of use tax liability on VIP under the United States Constitution (62a-65a).

Petitioner filed a Notice of Exception with the Tax Appeals Tribunal ("the Tribunal") (108), which on January 21, 1993 issued a decision affirming the ALJ's determination. The Tribunal concluded, *inter alia*, that the activities of VIP's employees "created a sufficient nexus to impose a use tax liability for the sale of the computer hardware" (46a). Because VIP's employees come to New York to install, provide maintenance for or train customers in the use of VIP's customized software, its "physical presence" in the State "created sufficient nexus" (46a).

On May 20, 1993, petitioner commenced a proceeding pursuant to NY Tax Law § 2016 in the Appellate Division, Third Department (5). Respondent Commissioner of Taxation and Finance duly answered (56). On July 28, 1994, the Appellate Division issued a memorandum and judgment annulling the Tribunal's determination. The Appellate Division concluded that VIP lacks "sufficient contacts with New York to satisfy the constitutional prerequisites for imposing a duty to collect and remit use taxes" (287). The court noted that *Quill Corp. v North Dakota*, 504 US 298 (1992), prohibits the imposition of a duty to collect and remit use tax "upon a party having no 'physical presence' in the taxing state" (26a). The court found in *Quill* a constitutional requirement that an out-of-state vendor have a "substantial 'physical presence' " in a taxing state to justify imposition of sales or use tax under the Commerce Clause of the United States Constitution (28a). Accepting petitioner's statement that it is not "petitioner's ordinary practice to travel to its customers' places of business" and finding that petitioner made "no more than 30 or 40 . . . visits to New York over the

three-year period," the Appellate Division concluded that "[t]his activity, without more, does not rise to the level necessary to justify taxation" (27a).

Pursuant to NY CPLR § 5601(b)(1), respondent appealed to the New York Court of Appeals as of right (283). The case was consolidated with that of *Orvis Co., Inc. v Tax Appeals Tribunal*, 204 AD2d 916 (3d Dept 1994). On June 14, 1995, the Court of Appeals issued a decision reversing the Appellate Division's holding with respect to VIP. The Court of Appeals, recognizing that the Appellate Division based its decision on an interpretation of *Quill* as having "increased the requisite threshold of in-State physical presence [under the Commerce Clause] from any measurable amount of in-State people or property to *substantial amounts* of in-State people or property," (10a, *quoting Orvis Co., Inc.*, 204 AD2d at 917) (emphasis added by Court of Appeals), first undertook an examination of "the evolution of Supreme Court doctrine limiting the authority of a State to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce" (3a). As the Court of Appeals noted, prior to *Quill,* "the constitutionally required nexus between the taxing State and the activity, entity or property subject to the tax was applied indistinguishably for purposes of both Due Process and Commerce Clause analysis" (4a). In *National Bellas Hess, Inc. v Department of Revenue of Illinois*, 386 US 753 (1967), the state court observed, this Court "for the first time explicitly made some physical presence of the vendor in the taxing State a requirement under both the Commerce and Due Process Clauses for charging the vendor with the duty of collecting a use tax on mail-order purchases by residents of that State" (4a-5a). The Court of Appeals added that in *National Geographic Society v California Board of Equalization*, 430 US 551, 556

(1977), this Court concluded that "the required physical presence of the vendor in the taxing State must be more than the 'slightest presence'" (7a).

In *Quill*, the court below noted, this Court expressly "overruled so much of *Bellas Hess* as required some physical presence of the vendor as a 'minimum connection' in the taxing State to support the jurisdiction to tax under the Due Process Clause" (8a). This Court, however, retained the physical presence requirement under the Commerce Clause. The twofold justification for retaining this requirement, the Court of Appeals observed, was its furtherance of a bright-line test or " 'demarcation of a discrete realm of commercial activity that is free from interstate taxation,' " and the doctrine of stare decisis, which " 'counsels adherence to settled precedent' " (9a, *quoting Quill*, 504 US at 314, 317).

On the basis of its survey of this Court's decisions, the Court of Appeals concluded that *Quill* could not be read as imposing a requirement of a nonresident taxpayer's "substantial" physical presence in the taxing state. First, said the state court, "as a matter of simple logic and semantics, [this] Court was not applying a *substantial* physical presence requirement" in the many cases prior to *Quill* in which it upheld imposition of a state tax on interstate vendors with relatively little physical presence in the taxing state (10a) (emphasis in original). *Quill* itself, the court added, cannot possibly be construed as expanding the *Bellas Hess* "physical presence requirement," for even that modest threshold would, according to *Quill*, not be " 'dictated . . . were the issue to arise for the first time today' " (10a-11a, *quoting Quill*, 504 US at 311).

Moreover, the Court of Appeals said, treating *Quill* as imposing "an in-State substantial physical presence requirement . . . would destroy the bright-line rule [this] Court in *Quill* thought it was preserving in declining completely to overrule *Bellas Hess*," thus "undermin[ing] the principal justification" for the decision in *Quill* and requiring a case-by-case evaluation of the substantiality of each vendor's presence (11a). Finally, the Court of Appeals recognized that this Court, in its sole post-*Quill* sales tax decision, "did not apply a substantial physical presence test," and found sufficient physical presence of a vendor under the Commerce Clause "without even passing reference to the substantiality of the physical presence of the vendor" (11a, citing *Oklahoma Tax Commission v Jefferson Lines, Inc.*, ___ US ___, 115 S Ct 1331, 131 L Ed 2d 261 [1995]).

Thus, the Court of Appeals concluded that "the true import of the physical presence requirement . . . under contemporary Commerce Clause analysis" is that "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence' " (12a). Applying this standard, the court below held that VIP had not "sustained its definite burden of establishing immunity under the Commerce Clause from [its] tax collection obligation" (12a). Evidence in the record permitted the inference "that VIP's hardware and software sales agreements obligated it to provide a charge-free visit of a VIP computer software installer at its beverage-distributor customer's site in New York if problems necessitating the visit occurred within the first 60 days of installation" (14a-15a). "Moreover," the court added, "VIP's invoices showed charges for travel expenses to its New York customers' locations on 41 occasions . . . during the three year audit period, in which VIP had 154 taxable transactions in New York" (15a). These "trouble-shooting visits to New York

vendees" and VIP's "assurances to prospective customers that it would make such visits enhanced sales and significantly contributed to VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York" (15a). Thus, VIP's activities in New York were "of greater significance than merely a slightest presence," and justified imposition on VIP of a duty to collect compensating use tax (15a).

REASONS FOR DENYING THE WRIT

The decision of the New York Court of Appeals does not conflict with any decision of this or any other court.

After an exhaustive and scholarly review of the entire history of this Court's constitutional sales and use tax jurisprudence, the New York Court of Appeals concluded that *Quill Corp. v North Dakota* does not "make a *substantial* physical presence of an out-of-State vendor in New York a prerequisite to imposing the duty upon the vendor to collect the use tax from its New York clientele" (2a-3a). This holding comports fully with *Quill* and with the cases that precede and follow it. The supposed "conflicts with this Court's decisions," upon which VIP bases its petition for certiorari, are simply nonexistent.

Petitioner's first contention is based on misreading of both *Quill* and the decision below. According to petitioner (Petition, p 13), the Court of Appeals "determin[ed] that any physical presence beyond mail or common carrier in [New York] violates the 'bright-line rule' of *Bellas Hess* and gives rise to use tax liability.' " This, petitioner argues (Petition, pp 13-14), conflicts with *Quill*, for the taxpayer in *Quill* "had some physical presence in the State," but this physical presence was deemed too minimal to give rise to liability to collect use tax. Thus,

petitioner concludes (Petition, p 14), the Court of Appeals "misconceived the 'bright-line' rule," which "is not a bright line dividing mail and common carrier contacts with the State from all other contacts," but rather "divides physical presence from a vendor's insubstantial in-State activities."

This flatly misconstrues both the decision below and *Quill*. The Court of Appeals repeatedly acknowledged and relied on (7a, 12a, 14a) this Court's rejection in *National Geographic* of a "slightest presence" test for nexus. 430 US at 556; *see also, Quill*, 504 US at 315 n 8 (*National Geographic* "expressly rejected a 'slightest presence' standard of constitutional nexus"). Indeed, the precise holding below is that, under *Quill* and *National Geographic*, a vendor's physical presence in a taxing state "must be demonstrably more than a 'slightest presence' " (12a).

It was the Court of Appeals' meticulous reading of *Quill*, its predecessors and its progeny that enabled it both to extract this standard and to apply it to the facts in the present case. As the court below noted (10a), it is apparent "as a matter of simple logic and semantics" that the limited activities that justified imposition of tax on the out-of-state vendors in several pre-*Quill* decisions did not amount to a "substantial" physical presence. *See, Goldberg v Sweet*, 488 US 252 (1989) (interstate telephone carrier's billing to an in-state address for calls originating or terminating in the taxing State); *Standard Pressed Steel Co. v Washington*, 419 US 560 (1975) (solitary engineer-consultant operating an office in his home); *Scripto, Inc. v Carson*, 362 US 207 (1960) (ten part-time, nonexclusive, independent contractors soliciting sales on commission); *General Trading Co. v State Tax Commission*, 322 US 335 (1944) (Minnesota company sending Minnesota-based travelling salesmen to Iowa); *Felt & Tarrant Mfg. Co. v Gallagher*, 306 US 62 (1939) (two non-

employee commissioned sales solicitors). Similarly, as the Court of Appeals understood, the one case decided after *Quill* in this area cannot be read as imposing a "substantial" physical presence requirement. *See, Oklahoma Tax Commission v Jefferson Lines, Inc.*, ___ US ___, 115 S Ct 1331, 1338, 131 L Ed 2d 261 (1995) (" 'nexus aplenty' " for purposes of Oklahoma sales tax on interstate bus fare is found in facts that "Oklahoma is where the ticket is purchased, and the service originates there").

Quill, conversely, is best understood as an instance of truly minimal physical presence. In *Quill*, the sole physical manifestation of the out-of-state mail-order vendor was the presence in the taxing state of "a few floppy diskettes," 504 US at 315 n 8 -- six copies[2] of a software program licensed by the vendor to retailers in order to enable the retailers to check the company's current inventories and prices and place orders directly. 504 US at 302 n 1, 315 n 8. Such a presence, said this Court in *Quill*, "might constitute some minimal nexus," but is insufficient, without more, to "meet the 'substantial nexus' requirement of the Commerce Clause." 504 US at 315 n 8. At the same time, this Court emphasized in *Quill*, very little is necessary to make for the requisite physical presence. A "small" physical presence, such as "a small sales force, plant or office," may permit a State to "compel a vendor to collect a sales or use tax." 504 US at 315. This Court further noted that the standard it imposed for the requisite physical presence amounting to substantial nexus under the Commerce Clause was a "bright-line test," which "firmly establishes the boundaries of legitimate state authority,"

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[2]The decision in *Quill* does not make clear how many separate copies of the software program were extant in the taxing state, but the parties' briefs in that case establish that the number was six. *See*, Petitioner's Reply Brief at 15.

"reduces litigation concerning [sales and use] taxes," and "encourages settled expectations," thus "foster[ing] investment." 504 US at 315-316.

Quill likewise makes clear that, as the court below understood (6a), the requirement under the Commerce Clause that a nonresident taxpayer's activity have a "substantial nexus with the taxing State" derives from *Complete Auto Transit, Inc. v Brady*, 430 US 274, 279 (1977), where it is identified as one aspect of a four-part test pursuant to which a state tax is scrutinized under the Commerce Clause. *See, Quill*, 504 US at 311. There is no warrant whatever for conflating the "substantial nexus" requirement with a demand that a taxpayer have a "substantial physical presence" in the taxing State.

The decision below thus comports entirely with *Quill* and other decisions of this Court. On the one hand, the physical presence sufficient to impose sales or use tax on an out-of-state vendor must be more than "minimal." On the other hand, such a presence can be less than "substantial," as demonstrated by both the factual circumstances of the cases in which state taxes have been upheld and this Court's observation that a "bright-line, physical-presence requirement" is to be applied, 504 US at 317. A "substantial physical presence" standard of constitutional nexus, of the sort urged by petitioner, would, by contrast, leave the taxability of any given out-of-state enterprise open to question and require extensive case-by-case evaluation of a taxpayer's presence in the taxing State. In emphasizing the need for and the virtues of a bright-line test for nexus, this Court in *Quill* cannot have meant to endorse a test that draws no line of any sort. In the wake of *Quill*, the "bright line" must be drawn exactly where the Court of Appeals drew it: at a point "demonstrably more than a 'slightest presence' " (12a). VIP cannot seriously contend that its activities in New York -- including a

guarantee to New York customers that it will visit the customer's place of business if "needed," entailing at least 41 such visits over a three-year period, and giving rise to billing for New York visits on more than one-quarter of its New York invoices during that period -- fall on the nontaxable side of the bright line drawn correctly by the Court of Appeals.

Nor, as petitioner argues (Petition, p 15), is there any conflict between the decision below and this Court's decision in *Miller Bros. Co. v Maryland*, 347 US 340 (1954). *Miller Bros.* invalidated on due process grounds the imposition of state use tax on a vendor whose only physical presence in the taxing state consisted of "some" deliveries made with the vendor's own truck. *Id.* at 341. As the Court of Appeals recognized (8a, n 2), that case had nothing to do with the Commerce Clause. *See*, 347 US at 347 (Court expressly does not consider whether statute at issue "imposes an unjustifiable burden upon interstate commerce").

VIP next contends (Petition, pp 15-17) that the decision below improperly "equate[s] the 'substantial nexus' requirement of the Commerce Clause with the minimum contacts requirement applicable to the Due Process Clause." It is not entirely clear where petitioner detects this "equation." Petitioner argues, essentially, that the connection between VIP and New York does not even satisfy the supposedly "more lenient due process requirement," such that the "stricter Commerce Clause standard" cannot possibly be fulfilled. According to petitioner, because "the limited physical presence of VIP in New York [i.e., its visits in connection with the nontaxable software it sold] was wholly unrelated to the taxable transactions at issue [i.e. its sales of $1.2 million in computer hardware]," and because the Due Process Clause supposedly requires a higher threshold of contacts when the nonresident's activity on which jurisdiction is

based is unrelated "to the subject of litigation," there can be no "personal jurisdiction" over VIP's taxable sales on the basis of the unrelated activity.

To state this argument is simultaneously to refute it. First, the activities for which VIP may be held accountable in New York under the Due Process Clause are not "unrelated" to its taxable sales of computer hardware. VIP's argument ignores the fact that, as discussed above, liability under the Due Process Clause arises not from physical presence *per se* but rather from activities of any sort that are "purposefully directed" at the taxing state's market. VIP made no showing whatsoever that its aggressive and continuous solicitation of New York business did not include efforts to sell both hardware and software. Thus, the activities giving rise to VIP's liability under the Due Process Clause were intimately "related" to its taxable transactions in New York.

There is, moreover, no justification for VIP's treatment of the different standards under the Due Process and Commerce Clauses as essentially identical in kind and differing only in "leniency." As this Court emphasized in *Quill*, the two constitutional provisions "differ fundamentally" and "reflect different constitutional concerns." 504 US at 305. The Due Process Clause addresses the question of whether an out-of-state vendor has "subject[ed] itself to the State's *in personam* jurisdiction" by "purposefully avail[ing] itself of the benefits of an economic market in the forum State," notwithstanding the vendor's lack of "physical presence in the State." 504 US at 307. It is the vendor's economic "access to the State," not its physical presence *per se*, that matters. 504 US at 308. The Commerce Clause, by contrast, is "animated by different constitutional concerns and policies." 504 US at 312. Whereas "[d]ue process centrally concerns the fundamental fairness of governmental

activity," "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." 504 US at 312. It is thus not a matter of the two provisions imposing, as VIP would have it, weaker or "stricter" standards, but rather of their vindicating entirely different constitutional concerns and entailing an examination of factors that need not overlap.

Nor, indeed, does petitioner's argument on this point cohere even on its own terms. VIP, as noted above, makes much of the fact that its physical presence in New York, attributable to its nontaxable sales of software, was "unrelated" to the sales of computer hardware for which it was taxed. This is of no constitutional consequence. As this Court has made clear, "[t]he relevant constitutional test . . . is not whether the duty to collect the use tax relates to the seller's activities within the State," but rather whether there is a nexus " 'between [the State and] the *person* . . . it seeks to tax.' " *National Geographic*, 430 US at 561 (*quoting Miller Bros.*, 347 US at 344-45) (brackets, emphasis and ellipsis in *National Geographic*). Similarly, petitioner's argument hinges on its assertion (Petition, p 16) that the activities that subject an out-of-state vendor to taxation must be conducted continuously within the State. For more than fifty years, however, the law has been otherwise. *See, General Trading Co. v State Tax Commission*, 322 US 335, 337 (1944) (upholding Iowa use tax imposed on property "sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters").

There is, finally, no conflict between the decision below and *Wisconsin Department of Revenue v William Wrigley, Jr., Co.*, 505 US 214 (1992). This case has nothing whatever to do with the Commerce Clause or any other constitutional provision,

dealing instead with 15 USC § 381(a), which prohibits a State from taxing the income of a corporation whose only business activities within the State consist of "solicitation of orders" for tangible goods. This Court's holding that nontaxable "solicitation of orders" includes "activities that are *entirely ancillary* to requests for purchases," but not "those activities that [a] company would have reason to engage in anyway," regardless of its sales activities, 505 US at 228-229 (emphasis in original), has no bearing on the issues in the present case. Indeed, the most noteworthy aspect of *Wrigley* for present purposes is its congruence with the decision below. *Wrigley* held squarely that "employing salesmen to repair or service [a] company's products is not part of the 'solicitation of orders,' since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases* . . . ." *Id.* at 229 (emphasis in original). Even if, as petitioner contends (Petition, p 17), *Wrigley* stands for the *constitutional* proposition that "solicitation of orders" within a state by a nonresident vendor is "not a sufficient predicate for taxation" by that State, the fact remains that the repair and service work undertaken by VIP falls outside this statutory limitation.

There is likewise no conflict between the decision below and that of an intermediate appellate court in *Florida Department of Revenue v Share International, Inc.*, No. 93-4093, 1995 WL 492954 (Fla App Aug. 21, 1995). The case holds only that the abbreviated physical presence in Florida of an out-of-state vendor did not, "under the circumstances," establish a substantial nexus with Florida under the Commerce Clause. The decision, like that of the New York Court of Appeals, recognizes no more than that, under *Quill*, an out-of-state vendor that has some physical presence, however minimal, in the taxing state, does not invariably subject itself to state sales or use tax.

There is no conflict between this holding and the decision below. The Florida court, moreover, immediately certified the nexus question that arose in *Share International* to that State's Supreme Court. If the case eventually produces a conflict of some sort, it can be addressed via a grant of certiorari in that case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
October 17, 1995

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondent

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel